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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD PHILLIPS, Defendant and Appellant.	A121094 (Napa County Super. Ct. No. CR6195)

INTRODUCTION

Appellant Donald Phillips (Phillips), now 62 years old, has spent most of his adult life in institutions, much of it in the custody of the Department of Mental Health (DMH). He comes before the court after a jury extended his commitment for two additional years pursuant to Penal Code section 1026.5.[1] He seeks reversal of that commitment because the jury was not instructed that it must find that he had serious difficulty controlling his dangerous behavior in order to extend his commitment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Phillips's social and criminal background

Phillips was born Marvin Eugene Miller, the product of the rape of his 12-year-old mother by his 25-year-old father. He was initially placed in foster care, where he was known as Perry Sunny Littles. Later in life, after an arrest, he made up the name "Donald Ph.d. Phillipson" and identified himself at trial as "Donald Ph.D. Phillips."

[1] All statutory references, unless otherwise indicated, are to the Penal Code.

Phillips testified that he was abused by his foster mother, who "whooped" him with ironing cords, tree branches, and a switch. He was also sexually molested by an older neighbor when he was nine years old. When he was 12, he moved back in with his biological mother and later lived with his grandparents, who also beat him. The childhood abuse caused him to have a problem with authority figures.

His first crime was committed in 1968, when he was 21 years old. Having become homeless, he tried to rob a clothing store owner by luring him out of the store and then demanding money at gunpoint. The shop owner pulled out a gun and fired several shots over Phillips's head, then ran back into the store. Phillips then filled the door with bullets until it "fell off the hinges." He got no money, and he was not caught by the police. He returned the next day to the same store to attempt the robbery again, but this time he was arrested. Convicted of assault with a deadly weapon (§ 245, subd. (a)), he was sentenced to prison, where he was first prescribed antipsychotic medications. He served much of his time in the DMH facility at Vacaville because of mental illness.

He was paroled on July 24, 1973, and about three weeks later killed his roommate/lover. He testified at trial that the victim was "dominant" and "mean" and used to throw him against the wall. After one such incident, Phillips stabbed him in the armpit with a butcher knife, then twisted the knife. Although Phillips was responding to auditory command hallucinations at the time of the offense, he was convicted of murder (§ 187) and again sentenced to prison, again spending most of his time in DMH Vacaville.

Phillips was paroled on November 6, 1980, but sixteen days later committed an unarmed robbery of a grocery store, while wearing a Halloween mask, pretending his finger was a gun. He was sentenced to prison, but was hospitalized in 1984 under section 2960 et seq. It was during this hospitalization that Phillips committed his most recent offense, for which he was committed under section 1026.

The offense resulting in section 1026 commitment

At approximately 1:30 a.m. on May 5, 1985, while a patient at Napa State Hospital (NSH), Phillips began doing push-ups on the floor next to his bed. Mary Jackson, a psychiatric technician, told him he could not exercise there because it was keeping other patients awake. She told him he could exercise in a side room, but Phillips responded, "You will have to kill me or I'll kill someone before I go to a sideroom."

Bruce Waterbury, another psychiatric technician, tried to calm Phillips down as Jackson telephoned for help. Phillips retrieved a sharpened pencil from his room, concealing it in his hand.

When a third staff member responded to Jackson's call, Phillips threw a punch at him. As Waterbury tried to intervene, both Phillips and Waterbury fell to the floor. Phillips then stabbed Waterbury in the back with the pencil, leaving a gash five inches long and one-quarter inch wide, and also struck him in the face, narrowly missing Waterbury's eye. Phillips was disarmed and placed in restraints.

In a subsequent statement to police, Phillips said he intended to kill Waterbury and was aiming for the "heart and kidneys." He thought he would be killed if he did not protect himself. Phillips testified that the problem originated when the staff refused to give him his asthma inhaler, which made him think they were trying to kill him. He was responding to auditory command hallucinations at the time of the attack, and Dr. Pittavino testified that Phillips was not compliant with his medications.

Phillips pled guilty to attempted murder (§§ 187, 664), but was found not guilty by reason of insanity on October 10, 1986, and committed to the DMH for a period not to exceed 12 years. (§ 1026.) He is currently housed at NSH.

He was released in May 1992 through the Conditional Release Program (CONREP), but his outpatient status was revoked in April 1993 because his condition had deteriorated to the point that he was again considered dangerous.

His initial commitment expired on April 1, 1998, but Phillips has remained institutionalized to date, with the court ordering a two-year extension of his commitment

on five occasions. On December 4, 2007, the district attorney filed a petition to extend Phillips's commitment once again. Jury trial began on March 17, 2008.

Testimony regarding the current extension of commitment

Two state mental health professionals testified that Phillips needed to remain institutionalized for reasons of public safety. Stephen Pittavino, Ph.D., a licensed psychologist, had treated Phillips on a part-time basis since September 2007. He identified Phillips's primary diagnosis as schizoaffective disorder, involving severe thought and mood disorders. The thought disorder included paranoid ideation, especially when Phillips was not medicated. The mood disorder was of a manic nature; Phillips was "very impulsive" and at times became "menacing and threatening."

Dr. Pittavino opined that Phillips's "significant stumbling block" was the "management of impulse control and irritability," and specifically that he "still has episodes in which he is unable to maintain his impulse control." Phillips had difficulty tolerating frustration and managing "delay of gratification," and at times became "agitated, irritated, menacing and threatening." Phillips tended to be hypersensitive and to develop unrealistic fears that others wanted to harm him, and in the past had reacted violently to such delusions. In one meeting with his treatment team, Phillips became "irate" and left the meeting early because staff brought up his impulse control problem. Phillips was "easily agitated and irritable" in response to common everyday stressors.

Dr. Anish Shah, supervising staff psychiatrist at NSH, had also directly treated Phillips one-on-one between August and December 2007. He diagnosed Phillips with bipolar disorder, characterized by mood swings, insomnia, a sense of grandiosity or entitlement, and sometimes paranoia. Phillips's past violent conduct had tended to follow a full-blown psychotic episode. Phillips's personality disorder did not fit neatly into one diagnostic category and could be considered "not otherwise specified." Phillips had trouble dealing with authority figures, and his symptoms included narcissistic features and poor impulse control.

Phillips was receiving multiple medications for his bipolar and schizoaffective disorders and for dizziness, with a standing order for additional Benzodiazepines to be

administered "as needed" upon Phillips's request. The medications stabilize symptoms but do not "cure" bipolar disorder. Dr. Shah had increased the dosage of one antipsychotic medication in the past four months because Phillips had hypo-manic residual symptoms of his bipolar disorder (e.g., pressured speech, flight of ideas, and difficulty concentrating). Phillips had requested Benzodiazepines 19 times in the ten weeks prior to trial.[2]

Dr. Shah had stressed with Phillips the importance of remaining on his medications, and Phillips had promised to remain compliant if released. Dr. Pittavino, however, was "skeptical" about this promise because the last two times Phillips was released he became non-compliant within two weeks. Dr. Shah said there is "no way to predict" what would happen if Phillips were to stop taking his medication. Dr. Pittavino testified that in Phillips's two prior violent offenses (the murder of his roommate and attempted murder of Waterbury), he had been non-compliant with his medications and was having auditory command hallucinations.

Dr. Pittavino also testified about recent incidents in which Phillips became "menacing and threatening" to the staff. On one occasion about five months before trial, Phillips accused the staff of locking him in the laundry room, although that was extremely unlikely. Phillips did not become physically violent, but he was agitated and "threatening," prompting the staff to sound an alarm. Dr. Shah confirmed that Phillips tended to have problems with staff.

On another occasion, Phillips felt that participation points (through which he could earn privileges) were unfairly denied him. Phillips became "irate" and had to be given medication to help him control the agitation. Dr. Pittavino was working to help Phillips "redirect his agitation or aggression" without the need of medications. This would be necessary before his release because CONREP will not accept participants who are using

[2] Dr. Shah testified that Phillips used the "as needed" drugs minimally, and Phillips testified that most of his requests for medication were for dizziness.

Benzodiazepines at all (because they are commonly sold as street drugs), and will not accept patients who are using "as needed" medications.[3]

Both doctors agreed that Phillips had made very significant progress in his treatment but was not yet ready for release, as he still represented a danger of physical harm to others. He had been compliant with his medications at NSH and cooperative in attending groups. Dr. Shah noted that Phillips still had some hypo-manic symptoms that could lead to full-blown psychosis, and he needed to work on non-pharmacological treatment. Both experts agreed that he would need to have a comprehensive relapse prevention program in place before being released. Both doctors predicted that Phillips would remain a danger even if medicated.

Phillips's testimony

Phillips testified not only regarding his social and criminal history, as outlined above, but also about his progress in managing his mental illness. As a young man he was "very, very, very mean" and "mad all of the time." However, since being hospitalized he had learned better communication skills and learned how to calm himself by watching television, using self-talk, or counting backwards. The NSH staff was doing a "beautiful job" of helping him, and his current medications worked much better than the earlier ones. His mood swings have improved and are "beautiful right now." Although he had some ambivalence in past years about his readiness for release, he felt ready at the time of trial.

He testified that he has held jobs at the hospital, including his current position on the Cooperative Advisory Council, in which he advocated for patient needs. He was also on ward government detail, advising staff of repair and maintenance problems. He had a grounds card, which allowed him more freedom of movement. He had been on an "open" unit for a year and "worked hard" to get there. He participated in groups, including an anger management group.

[3] Dr. Shah did not believe this was a hard-and-fast rule in all CONREP programs.

With respect to the laundry room incident, he had been doing his laundry, but when he emerged he found that everyone else had gone to breakfast without telling him. He missed breakfast and was very angry. He addressed staff inappropriately, but he did not become physical because the staff member was a woman and he does not "hit ladies."

As for the participation points, he had been denied points because he was late submitting his card. He claimed the staff had changed the deadline without advising him. He tried to calm himself by watching television but could not calm down. His blood pressure was very high, and he asked for a Benzodiazepine drug called Ativan to help control his agitation.

He had not been involved in a physical altercation since 2001, when he again got into a confrontation with staff when they would not give him his asthma inhaler. The police were called and Phillips was put in restraints. He said he now gets along "lovely" with his peers and his roommate.

If released he said he would seek help from a Catholic Church in finding a place to live, eat and work. He would do janitorial work, restaurant work, plumbing, or carpentry. He would like to go to college, get married and have children.

He stressed that he had always been compliant with his medications. He knew he needed to take the medications, but they did not always work. He claimed he was on medication when he killed his lover and when he committed the unarmed robbery.

On March 18, 2008, the jury returned a verdict finding that Phillips has a mental disease, defect or disorder that causes him to present a substantial danger of physical harm to others, even in his present medicated condition. This appeal followed.

DISCUSSION

The sole issue on appeal is whether omission of an element from a jury instruction—that Phillips must have had "serious difficulty controlling his dangerous behavior" to justify recommitment—requires reversal of the jury's verdict. We conclude the omission was not prejudicial, in large part because the jury actually made the required finding despite the lack of instruction.

A. <u>An extension of commitment under section 1026.5 requires an instruction and finding that the defendant has "serious difficulty controlling his dangerous behavior."</u>

Ordinarily, one found not guilty by reason of insanity may be confined in a state hospital no longer than the maximum term of imprisonment for the underlying offense. (§ 1026.5, subd. (a)(1).) The commitment may be extended indefinitely, however, if the crime was a felony and, "by reason of a mental disease, defect, or disorder," the insanity acquittee continues to represent "a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1).) Each extension is for two years. (§ 1026.5, subd. (b)(8).)

A person subject to an extension of commitment is entitled to appointment of counsel, jury trial, and proof beyond a reasonable doubt. (§ 1026.5, subds. (b)(3) & (b)(7); *People v. Superior Court* (*Blakely*) (1997) 60 Cal.App.4th 202, 216; *People v. Superior Court* (*Williams*) (1991) 233 Cal.App.3d 477, 488.) Despite these protections, the extended commitment proceeding is essentially civil in nature, with its purpose being treatment rather than punishment. (*People v. Wilder* (1995) 33 Cal.App.4th 90, 99.)

The United States Supreme Court, reviewing the Kansas Sexually Violent Predator Act (SVPA), held that because of the liberty interests at stake,[4] an involuntary commitment complies with due process only if the state proves both a mental abnormality and a prediction of future dangerousness. In so holding, it noted that the Kansas SVPA combined these two requirements, thus allowing commitment if the mental disorder made it "difficult, if not impossible, for the person to control his dangerous behavior." (*Kansas v. Hendricks* (1997) 521 U.S. 346, 357-358 (*Hendricks*).) In *Hendricks*, the defendant was a diagnosed pedophile with an extensive history of sexual

[4] "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425.)

offenses, who admitted he could not control the urge to molest children when he was under stress. There was no question that volitional control was a problem for Hendricks.

In *Kansas v. Crane* (2002) 534 U.S. 407 (*Crane*), the high court again considered the Kansas SVPA in the case of a defendant diagnosed with exhibitionism and antisocial personality disorder. Specifically, the question at issue was whether a difficulty in controlling one's dangerous behavior was an element that the state must prove if the disorder was "emotional" rather than "volitional." (*Id*. at pp. 411, 414-415.) The court held that, while an absolute inability to control one's behavior could not realistically be required, it *is* necessary for the state to prove the defendant has "serious difficulty in controlling behavior." (*Id*. at p. 413.) Impairment of volitional control was adopted in *Hendricks* "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." (*Ibid*.) Simply categorizing a mental disorder as "emotional" rather than "volitional" did not alter the constitutional analysis. (*Id.* at p. 415.)

As *Crane* noted, "*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' [Citation.] That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment. [Citations.]" (*Crane, supra,* 534 U.S. at p. 412.) The volitional control test "serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous *beyond their control*." (*Hendricks, supra,* 521 U.S. at p. 358, italics added.) Other individuals may also have the potential for future dangerousness, but if it is not related to a mental disorder, they are not subject to commitment beyond their term of imprisonment. (*Id.* at pp. 357-358.)

The upshot of *Hendricks* and *Crane* is that even a mentally disordered person is not subject to involuntary commitment if, despite the mental impairment, he is capable of controlling his dangerous behavior.[5] Difficulty of control is to be assessed "in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself." (*Crane, supra*, 534 U.S. at p. 413.)

The California Supreme Court, picking up the thread from *Hendricks* and *Crane*, held that a juvenile committed pursuant to Welfare and Institutions Code section 1800 et seq., which establishes an extended detention scheme for juvenile offenders, is also entitled to a "difficulty of control" finding. (*In re Howard N.* (2005) 35 Cal.4th 117, 132.) Since then, section 1026.5 has also been interpreted as incorporating such a requirement. (*People v. Galindo* (2006) 142 Cal.App.4th 531, 536-537; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878; see also, *People v. Bowers* (2009) 169 Cal. App. 4th 1442, 1450.)

We, too, endorsed that view in *People v. Zapisek* (2007) 147 Cal.App.4th 1151 (*Zapisek*), in which the defendant had been institutionalized for eight years following a finding that he was not guilty by reason of insanity for assaulting a stranger with a knife, believing the stranger was Satan. (*Id.* at pp. 1162-1165.) We rejected the Attorney General's argument that a showing of lack of volitional control should not be required in cases where the defendant suffers from a "cognitive" disorder, rather than a "volitional" disorder. (*Id.* at pp. 1163-1164 & fn. 6.) We stressed that the issue is one of due process, which does not vary with the precise nature of the mental impairment. (*Id*. at p. 1164; see

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[5] In *Crane*, the Supreme Court noted that an expert estimated that some 40 percent to 60 percent of the male prison population could properly be diagnosed with antisocial personality disorder. (*Crane, supra,* 534 U.S. at p. 412.) The court was clearly concerned about the possibility of a state labeling an individual with a personality disorder or other mental disorder, predicting that he is dangerous, and keeping him confined indefinitely on an involuntary commitment, without proof that he could not control his behavior. (Cf. *Foucha v. Louisiana* (1992) 504 U.S. 71, 82-83.)

also *Crane, supra,* 534 U.S. at p. 415.) Thus, serious difficulty controlling dangerous behavior has become the constitutional litmus test for extension of commitment under section 1026.5, regardless whether that difficulty stems from a cognitive impairment, a compulsive disorder, or an emotional one.

Because there was substantial evidence in *Zapisek* that the defendant continued to suffer from delusions, the lack of an impaired control finding was harmless error. Zapisek "continued to believe wholeheartedly in delusions and experience paranoia he [could not] control, both of which [were] of the type that . . . led him to act violently in the past, and which [continued to] cause him to act inappropriately, including so as to pose a danger to others." (147 Cal.App.4th at p. 1166.)

Zapisek involved a court trial, and no question of jury instruction was presented. (*Zapisek, supra,* 147 Cal.App.4th at pp. 1154-1158.) In *People v. Sudar* (2007) 158 Cal.App.4th 655, 662-663 (*Sudar*), we extended the holding of *Zapisek* to require appropriate instruction on the control issue. Sudar had set fire to a church and two other buildings, believing God had told him to do so. He believed a satanic cult was operating out of the buildings. He was found not guilty by reason of insanity and, after the expiration of his maximum term in a state mental hospital, was subject to recommitment. (*Sudar, supra,* at p. 657.)

In *Sudar,* the jury was given the standard pattern instruction under CALCRIM No. 3453, which at that time did not include a requirement that it find the defendant had "serious difficulty controlling his or her dangerous behavior."[6] (*Sudar, supra,*

[6] CALCRIM No. 3453 (Fall 2008) now includes that language. At the time of Sudar's trial (August 30, 2006), the impairment of control element was not included in the CALCRIM instruction (*Sudar, supra,* at p. 658.) By the time of Phillips's trial, CALCRIM had added the element in brackets, but the Bench Notes specified that it need be given only "[i]f the evidence raises a reasonable doubt about the serious impairment of the ability to control behavior." (CALCRIM No. 3453 (Fall 2007), Bench Notes, p. 912; *id*. (Spring 2008) at p. 914.) It was not until the Fall 2008 edition that CALCRIM began requiring the instruction in all cases.

158 Cal.App.4th at pp. 662-663.) Defense counsel requested that the instruction be modified to include that language based on the decision in *Howard N., supra,* 35 Cal.4th 117. His request was denied, as the trial occurred before that decision had been extended to section 1026.5 cases. (*Sudar, supra,* at p. 662.)

By the time of Sudar's appeal, *Galindo, Bowers* and *Zapisek* had applied the reasoning of *Howard N.* to commitment-extension proceedings. We held that the court erred in refusing an impairment of control instruction. However, the error was not prejudicial because the evidence showed that Sudar continued to suffer from delusions which "overpower[ed] his judgment," and "he felt compelled to act in accordance with" those delusions. (*Sudar, supra,* 158 Cal.App.4th at p. 665.) Indeed, Sudar himself "did not believe he was mentally ill, did not acknowledge having substance abuse problems, had no remorse for his criminal conduct, and consistently maintained that he would do the same thing in the same circumstances." (*Id*. at p. 663.) Thus, as a direct result of his cognitive disorder, Sudar had obvious control problems which rendered the lack of instruction harmless.

B. The fact that defense counsel requested an erroneous instruction does not bar review where the record fails to show that decision was tactical.

In this case, unlike *Sudar*, the court gave the jury an instruction specially requested by defense counsel, as follows:

"In this case, the question for your determination is whether the respondent, Donald Phillips, by reason of a mental disease, defect, or disorder, represents a substantial danger of physical harm to others. [¶] The Plaintiff has the burden of proving beyond a reasonable doubt, that the respondent;

"Has a mental disease, defect, or disorder, and;

"By reason of this mental condition he represents a substantial danger of physical harm to others."

Notably, the requested instruction did not include the element that Phillips must have "serious difficulty in controlling (his/her) dangerous behavior," as is currently included in CALCRIM No. 3453. (See fn. 6, *ante*.) This is the crux of Phillips's claim of error.[7] In light of our holding in *Sudar*, we agree that Phillips was entitled to instruction on that element.

The Attorney General argues that, because a commitment extension is technically a civil proceeding, any error in jury instruction was forfeited by defense counsel's specific request for the instruction actually given. As noted above, however, the procedural protections applicable in criminal trials are also afforded in commitment-extension proceedings. (§ 1026.5, subd. (b)(7) ["The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings"].) The duty of sua sponte instruction appears to be among those protections. (*People v. Wilder*, *supra,* 33 Cal.App.4th at p. 102 [applying sua sponte instruction rule in § 1026.5 case];[8] CALCRIM No. 3453 (Fall 2008), Bench Notes, p. 914.)

On occasion the Supreme Court has held that a criminal defense attorney's express consent to or request for an instruction bars the defendant from challenging it on appeal under the doctrine of invited error. (E.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1133-1134; *People v. Davis* (2005) 36 Cal. 4th 510, 539.) However, "[t]he invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction." (*People v. Moon* (2005)

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[7] Phillips also mentions in passing that the phrase "mental disease, disorder or defect" was not defined for the jury. Further definition was not required. (*People v. Wilder*, *supra*, 33 Cal.App.4th at pp. 102-104.)

[8] In *People v. Williams* (2003) 31 Cal.4th 757, the Supreme Court addressed the question of an impairment of control instruction on the merits, even though the precise language of the instruction requested by the defense at trial (requiring a finding that defendant was "unable to control" his dangerous behavior) was ultimately rejected as the appropriate constitutional standard in *Crane, supra,* 534 U.S. at p. 413. *Williams* reasoned that it was appropriate to address the issue on the merits to determine whether *Crane* "itself imposed *some* requirement to instruct specifically on impairment of behavioral control." (*Williams, supra,* 31 Cal.4th at p. 764, fn. 4.)

37 Cal.4th 1, 28; see also *People v. Valdez* (2004) 32 Cal.4th 73, 115; *People v. Prieto* (2003) 30 Cal.4th 226, 264-265 [doctrine bars appellate challenge only when defendant made a " 'conscious and deliberate tactical choice' " to request the instruction]; *People v. Cooper* (1991) 53 Cal.3d 771, 830–831.)

The record here reveals no tactical reason for counsel's omission of the constitutionally-mandated impairment of control element. Especially in light of the fact that she did not object to the inclusion of an impairment of control finding on the verdict form, we are inclined to think the instructional omission was due to oversight or ignorance, not tactics. Even if we could view the instructional omission as invited error, we elect to address the merits. The court arguably had a sua sponte duty to instruct accurately on the impairment of control element even if the defense offered an incorrect instruction,[9] and we prefer not to invite a future claim of ineffective assistance of counsel.

C. <u>The failure to instruct on serious difficulty in exercising behavioral control was harmless beyond a reasonable doubt, in part because the verdict form cured the instructional omission.</u>

The instructional error does not require reversal under the federal constitutional standard, which allows us to declare an error harmless if " ' "no rational jury could have failed to find [Phillips] harbored a mental disorder that made it seriously difficult for him to control his violent . . . impulses . . . [making] the absence of a 'control' instruction . . . harmless beyond a reasonable doubt" ' [Citation.]" (*Sudar, supra,* 158 Cal.App.4th at p. 664; *Howard N., supra,* 35 Cal.4th at pp. 137-138; see also, *People v. Williams, supra,* 31 Cal.4th at p. 778.) The record here meets that test.

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[9] At a minimum, it is the court's duty to ensure the jury is adequately instructed on "every material element" of the case. (*People v. Flood* (1998) 18 Cal.4th 470, 480-481.) Moreover, even when a trial court instructs on a matter on which it has no sua sponte duty to instruct, it must do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015; *People v. Cummings* (1993) 4 Cal.4th 1233, 1337.) This duty may require a trial court to correct an incorrect instruction submitted by the defense. (See, e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Whitehorn* (1963) 60 Cal.2d 256, 264-265; *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1597.)

The curious twist in this case is that, even though the jury was not instructed on the control issue, the verdict form did include findings that (1) Phillips "does have a mental disease, defect or disorder"; (2) this "mental disease, defect or disorder *does cause respondent Don Phillips to have serious difficulty controlling his behavior*, or seriously affects his capacity to properly perceive or process reality, or that the mental condition affects both capacities, such that he represents a substantial danger of physical harm to others"; and (3) "in his present medicated condition, the respondent, Don Phillips, does represent a substantial danger of physical harm to others." (Italics added.)

The Attorney General contends that the second finding by the jury cured the instructional error. Phillips argues it did not because the finding was phrased in the disjunctive and could have indicated *either* that (1) Phillips's mental condition caused him to have difficulty controlling his behavior, *or* (2) his mental disorder "affect[ed] his capacity to properly perceive or process reality."[10]

In *Zapisek* we rejected the Attorney General's argument that a cognitive disorder affecting one's perception of reality could warrant an extension of commitment without a showing of difficulty in controlling dangerous behavior. (147 Cal.App.4th at pp. 1164-1165.) Therefore, the verdict form should not have been used in this trial, which occurred more than a year after our opinion in *Zapisek* had been published.

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[10] This alternative language appears to derive from a case which was depublished by our Supreme Court, as discussed in *People v. Bowers*, *supra*, 145 Cal.App.4th at p. 878, fn. 4. The alternative test was evidently based on the belief that a defendant who is prevented from "properly perceiving or processing reality" due to a cognitive disorder should be distinguished from the ordinary criminal, so as to justify involuntary commitment, regardless whether volition is impaired. *Bowers* rejected this alternative test, as did we in *Zapisek*, *supra*, 147 Cal.App.4th at p. 1163, fn. 6. The appearance of the alternative standard in the verdict form in this case may be attributable to the fact that CALJIC, which has not revised its own instruction on this issue since 2006, continues to cite the depublished case and to include the alternative tests in its current publication. (CALJIC No. 4.17 (Spring 2009), at pp. 160-161, and Comment on CALCRIM No. 3453 at p. 1453.)

However, its use did not prejudice Phillips in this case. The first and second prongs of finding no. 2 on the verdict form were not mutually exclusive and could have involved a substantial factual overlap. Indeed, "there may be 'considerable overlap between a defective understanding or appreciation and [an] ability to control . . . behavior.' [Citation.]" (*Crane, supra,* 534 U.S. at p. 415.) As in *Zapisek* and *Sudar*, a mental disorder might easily impair one's perception of reality and also make it difficult to control one's behavior. Our only concern is to assure ourselves that in this case the jury did not base its finding on Phillips's difficulty perceiving or processing reality *in the absence* of a finding that he had difficulty controlling his dangerous impulses.

Although as a matter of grammatical structure the alternative finding might have been possible, when the actual evidence is considered we are confident the jury found that Phillips's mental condition at least made it difficult for him to control his dangerous behavior. As Dr. Pittavino testified, Phillips "still has episodes in which he is unable to maintain his impulse control." The primary focus of the expert testimony was on Phillips's aggressive overreaction to relatively minor events, as well as his difficulty calming himself down after becoming upset, whether as a result of delusional thinking or otherwise.

Though he had suffered from hallucinations in the past, the mental health experts found no evidence that he continued to do so, nor was there any testimony that Phillips presently lacked the "capacity to properly perceive or process reality." Rather, the expert testimony highlighted Phillips's "poor impulse control" and certain events in the recent past in which he had demonstrated difficulty in controlling his behavior.

Phillips also points out that the verdict form asked whether he had "serious difficulty controlling his behavior," without specifying that the jury must find he had "serious difficulty controlling his *dangerous* behavior." However, the verdict form went on to say that his difficulty must be "such that he represents a substantial danger of physical harm to others." This adequately conveyed that the uncontrolled behavior must

be dangerous. It was also clear from the experts' testimony that the impulses Phillips had difficulty controlling were of an aggressive nature.

Nor do we accept Phillips's argument that there was insufficient evidence of impaired control because there was no evidence that he had ever *tried* to control his dangerous conduct. This argument is grounded on the reasoning of *Galindo, supra,* 142 Cal.App.4th at p. 539, where the underlying felony was possession of a firearm by an ex-felon (§ 12021, subd. (a)). Galindo was bipolar and had antisocial personality disorder. (*Id*. at pp. 533-534.) He exhibited obnoxious behaviors on the ward and was resistant to hospital rules, but he had nevertheless "maintained adequate behavior" for several months prior to trial, while hospitalized and medicated. (*Id.* at p. 535.) Galindo was " 'at high risk for re-offending' " because he had "minimal insight into his mental illness" and refused to admit his own past substance abuse and his prior crimes, instead claiming he had been "framed." (*Id*. at pp. 534-535.) Galindo denied his mental health problems, refused to cooperate in treatment, and would likely discontinue his medications if released. (*Id*. at pp. 533, 536.)

The court found "abundant evidence that defendant's behavior was dangerous and that he did not, in fact, control it. However, the fact he did not control his behavior does not prove that he was unable to do so, thus making him 'dangerous beyond [his] control.' [Citation.] There was little, if any, evidence that he tried to control his behavior, that he encountered serious difficulty when trying to do so, or that his difficulty was caused by his mental condition. Rather, the evidence strongly suggested that defendant did not try to control his dangerous behavior, because he perceived no reason to do so." (*Galindo, supra,* 142 Cal.App.4th at p. 539, italics omitted.) In other words, there was a serious question whether Galindo was actually impaired by his mental disorder from controlling his dangerous impulses, thus rendering him subject to recommitment, or whether he was a "dangerous but typical recidivist" more appropriately dealt with through the criminal justice system. (*Crane, supra,* 534 U.S. at p. 413.)

On the other hand, there was ample evidence that Phillips attempted to control his behavior but was unable to do so. Drs. Pittavino and Shah both testified that Phillips had been taught "self-talk" and other methods of behavior control, and he was employing those skills, "although not adequately." Phillips also described the various techniques he used to try to control his aggressive reactions (e.g., watching television, using calming self-talk, and counting backwards). He attended an anger management group, evidently with a view toward gaining control over his dangerous impulses.

Although Phillips considered his efforts successful because he had not been involved in a physical altercation for several years, the expert testimony showed that he was still experiencing hostile impulses beyond his self-control. The experts' testimony was that Phillips's efforts, while improving, remained inadequately successful to allow his release. We find no reasonable possibility the jury found that Phillips's mental disorder continued to adversely affect his perception of reality to a degree that rendered him dangerous to others, without also finding that it seriously impaired his ability to control his dangerous impulses.

DISPOSITION

The judgment is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.